Cadbury Beverages, Inc. *and* Eugene A. Matzan.
Cases 3–CA–19380 and 3–CA–19597

November 7, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On February 11, 1997, Administrative Law Judge Jesse Kleiman issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

In adopting the judge's findings that the Respondent's September 1995[2] suspension and discharge of electrician Eugene Matzan violated Section 8(a)(3) and (1) of the Act, we note that our dissenting colleague has misconstrued or ignored certain facts concerning the discussions and understanding between Matzan and his supervisor preceding the Respondent's unlawful actions, as well as certain aspects of the Respondent's established operating procedures.

First, the Respondent was well aware of Matzan's involvement in union affairs.[3] Among his union activities, Matzan participated in the investigation and preparation of the discharge arbitration case of fellow unit employee, Bill Gowan. The arbitration hearing was scheduled to take place at the Respondent's office facility on the morning of September 11. Matzan agreed to Gowan's request that he attend the hearing. Matzan was scheduled to work a 4 a.m. to 12:30 p.m. shift.

A few days prior to the arbitration, Matzan asked his supervisor, Jim Fischette, for permission to come in (and therefore, to leave) 2 hours early on September 11. When Fischette asked why, Matzan replied only that he needed to tend to ''personal business.'' Fischette acquiesced. A day or so later however, on September 8, Fischette told Matzan that he could not accommodate his request because September 11 was going to be the Respondent's busiest workday. When Matzan insisted that he needed the time, Fischette told him that if he could not reschedule his business, to let him know how much time he would need to accomplish his tasks. On September 9, Matzan told Fischette that he needed a couple of hours at most and that he might be able to complete his task during his lunchbreak. Later that day, employee Tony Peluso told Fischette that the reason Matzan needed time off was to attend Gowan's arbitration.

On September 11, Fischette again asked Matzan why he needed time off. Matzan again told him that it was for personal business. Fischette then asked directly if he planned to attend the Gowan arbitration. Matzan replied that he could go anywhere he wanted during his lunch hour while he was off the clock.[4] Fischette nevertheless admonished him against attending the arbitration and warned that he could be suspended for leaving his shift without permission. Following this exchange, Fischette sought advice from Human Resource Director Meador, who told him to suspend Matzan if he walked off the job.[5]

Although electricians were not required to seek permission to alter their lunchtimes as long as they arranged for coverage, Matzan tried unsuccessfully thereafter to page Fischette to let him know he intended to take an earlier than usual lunchbreak. In accordance with established practice, Matzan had arranged with another electrician to cover for him during his absence.

Meanwhile, Fischette tried to page Matzan to direct him to an electrical problem within the plant. Matzan credibly testified that he did not respond to the page because the established practice was that the electrician covering him would respond to the call. Fischette then contacted the plant guard and directed her to tell Matzan that his services were needed. As Matzan passed by the guard's desk after clocking out, the guard told him that Fischette wanted to see him. Matzan replied that he was going to lunch and would see him on his return.

Within moments of his arrival at the conference room where the arbitration was being held, Matzan was asked to leave. On returning to the plant, Matzan encountered Fischette, who promptly suspended him and escorted him from the plant. Without further investigation, Matzan was terminated by letter of September 15.

While our dissenting colleague is correct that Fischette told Matzan, prior to learning that Matzan wanted to attend the arbitration, that he could not adjust his schedule precisely as requested, i.e., by moving his shift up by 2 hours, Fischette did not at that time foreclose the possibility of Matzan taking some time off for his ''personal business.'' Indeed, on September

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] Dates hereafter refer to 1995.

[3] The judge found, and we and our dissenting colleague agree, that the Respondent violated Sec. 8(a)(1) of the Act by suspending Matzan in April 1995, because of Matzan's protected concerted activities on behalf of employee Lisa Dennis.

[4] Employees are permitted to leave the plant during their lunchbreak if they clock out.

[5] Meador was the individual responsible for Matzan's unlawful suspension in April.

8, Fischette told Matzan that if he could not take care of his personal business outside of scheduled work hours, he should let him know how much time off he would need. In response to this inquiry, on September 9, Matzan told him that he might be able to do what he needed to do within his lunch hour. According to Matzan's credited testimony, Fischette told him that if he ''got it done in time, to come back and punch in and continue to work.'' Notably, this was Fischette's official response to Matzan's request before learning the nature of Matzan's personal business was to attend the Gowan arbitration.

By contrast, *after* Fischette learned that Matzan intended to use the time off to attend the arbitration hearing, he refused even to consider accommodating Matzan's request and expressly forbade him to attend the hearing. Such an abrupt reversal of position clearly evidences the Respondent's animus toward Matzan's protected activities and its retaliatory intent.

Despite our colleague's effort to paint Matzan's conduct on September 11 as insubordinate,[6] the credited evidence establishes beyond dispute that he acted in complete compliance with the Respondent's long-established practices. Because electricians were free to schedule their lunchbreaks, Matzan did not have to seek or obtain approval to take it when he did as long as he had arranged for coverage by another electrician. Matzan complied with this requirement. Further, to ensure that electricians would not lose their lunchbreaks, the Respondent did not require electricians to respond to pages when they were en route to lunch. Matzan followed this accepted practice on September 11. Simply put, Matzan's conduct on September 11 comported with established company procedures, and he did not act in derogation of these procedures by using his lunchtime to engage in protected union activities. Accordingly, the judge's findings that the Respondent violated Section 8(a)(3) and (1) of the Act by suspending and discharging Matzan is fully supported by the record in this proceeding.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Cadbury Beverages, Inc., Rochester, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[6] We find misplaced the dissent's reliance on the fact that Matzan did not ''participate'' in the arbitration and his characterization of Matzan's presence at the arbitration as ''not necessary.'' It was the Respondent's attorney who prevented Matzan from participating in the arbitration by ordering him to leave, and our dissenting colleague does not question the judge's finding that Matzan's attendance at the hearing constituted protected concerted activity.

MEMBER HIGGINS, dissenting.

I conclude that the General Counsel has not established that Matzan was fired because he went to an arbitration hearing. Instead, he was fired for clear insubordination. Accordingly, I dissent.

On September 6 or 7, Matzan asked his supervisor for a change of schedule for September 11 so that Matzan could take care of ''personal business.'' On September 8, his supervisor declined because September 11 would be the Respondent's busiest workday. Significantly, the supervisor acted without any knowledge that Matzan's ''personal business'' consisted of his going to an arbitration hearing.

On the following day, the supervisor again told Matzan that the schedule for September 11 could not be changed. Again, the supervisor did not know the nature of Matzan's ''personal business.'' Although Matzan suggested that he might need only the lunch hour, he never confined his request to the lunch hour.

On September 11, Matzan repeated his request. The supervisor again denied the request. Although the supervisor then knew that Matzan wanted to attend the arbitration, the supervisor's position was the same as it had been before such knowledge. The supervisor warned that Matzan could be suspended if he left his shift without permission.

Later that day, Matzan sought to change his lunch schedule, so as to be able to attend the arbitration. Although an employee need not get advance permission to change his lunch schedule, there is nothing to suggest that the Respondent cannot give advance refusal for such a change, where work requirements warrant the refusal. As noted above, this is precisely what the Respondent did in this case. Further, even as Matzan was leaving the plant, his supervisor tried to page him to tell him that he was needed to deal with an electrical problem. Matzan declined to answer his page. In addition, the Respondent's guard gave this message to Matzan before he (Matzan) clocked out for lunch.

Matzan went to the arbitration despite all of these directives and warnings. There is no suggestion nor is it contended that his presence at the arbitration was necessary. Indeed, it does not even appear that he participated in the arbitration.

In these circumstances, I conclude that the General Counsel has not shown that Matzan was fired because he went to the arbitration. The orders that he stay at work were issued before the Respondent knew that Matzan wanted to go to the arbitration. The orders were repeated to Matzan before he walked out the door. Matzan ignored all of this, and proceeded to the arbitration proceeding, where his attendance was not necessary.

In sum, Matzan was properly discharged for insubordination, rather than being improperly discharged in retaliation for his desire to go to the arbitration.

Ronald Scott, Esq., for the General Counsel.
Richard N. Chapman, Esq. and *Edward A. Trevvett, Esq*., for the Respondent.
Eugene A. Matzan, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JESSE KLEIMAN, Administrative Law Judge. On the basis of a charge and amended charge dated May 22 and June 26, 1995, respectively, in Case 3–CA–19380, and a charge and amended charge dated September 15 and 21, 1995, respectively, in Case 3–CA–19597, by Eugene A. Matzan, an individual (Matzan), a consolidated complaint and notice of hearing was issued on December 6, 1995, against Cadbury Beverages, Inc. (the Respondent) alleging that the Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). By answer dated December 15, 1995, the Respondent denied the material allegations in the consolidated complaint.

Also included in the consolidated complaint was Case 3–CB–6819 based on a charge filed by Matzan on May 22, 1995, against the Retail, Wholesale and Department Store Union, Local 220, AFL–CIO (the Union or Local 220). By answer dated January 11, 1996, the Union denied the material allegations in the consolidated complaint. On June 25, 1996, the Acting Regional Director for Region 3 issued an order severing cases since Case 3–CB–6819 was settled with the Union.

A hearing was held before me on July 1 and 2 , 1996, in Rochester, New York. Subsequent to the closing of the hearing, the General Counsel and the Respondent filed briefs.

On the entire record and the briefs of the parties, and on my observation of the witnesses, I make the following

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The Respondent, at all times material here, is and has been a corporation with an office and place of business in Williamson, New York (Cadbury's Williamson facility) engaged in the business of processing, canning, and /or bottling food and beverages. Annually, the Respondent sells and ships from its Williamson facility goods valued in excess of $50,000 directly to points outside the State of New York. I therefore find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is undisputed that the Retail, Wholesale and Department Store Union, Local 220, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

The consolidated complaint alleges that the Respondent suspended Eugene A. Matzan on April 10, 1995, because he engaged in protected, concerted activities and suspended Matzan and discharged him on September 11 and 15, 1995, respectively, because he engaged in union activities and protected, concerted activities and to discourage employees from engaging in these activities, in violation of Section 8(a)(1) and (3) of the Act.

A. *The Evidence*

Matzan became employed by the Respondent as an electrician on January 5, 1994, a bargaining unit position. He did not become involved in the affairs of the Union until January 1995 when he questioned the infrequency of union meetings and the Union's finances. On January 19, 1995, Matzan asked Larry Graffius, the Union's then vice president, for copies of the Union's bylaws, a financial statement of the past year, and a copy of the current collective-bargaining agreement. On January 20, 1995, he also asked George Blackmon the union president, for the bylaws. Failing to receive any of this information he then wrote to International Representative Myron Johnson on January 27, 1995, requesting the same information. In response to his request, Matzan was given a copy of the Union's LM-3, a financial document filed by labor organizations with the United States Department of Labor. Not satisfied with this Matzan asked Union Treasurer Harold De Santo for permission to inspect the Union's books which was refused. On February 11, 1995, Matzan again wrote to Johnson, asking that he and Steward Chris Smart be permitted to review certain of the Union's financial records for the past year, the underlying records on which certain entries in the LM-3 were based. When the Union did not respond Matzan, to ''put pressure on them to open the books'' reproduced the LM-3 and distributed between 50 and 60 copies to unit employees. At a union meeting in April 1995, the Union did ''open the books.''

On February 17, 1995, at about 9:30 a.m. Matzan was advised by his supervisor, James Fischette, that he was to attend a meeting of the Union's executive board. Blackmon, Graffius, and several other members of the board were present in the conference room as was International Representative Johnson.[1] Matzan testified that he was told by Graffius or Johnson that the meeting had been called to ''put pressure'' on him. Johnson asked Matzan to stop handing out to employees or posting copies of the LM-3 on bulletin boards because ''it was bad for the Union'' and ''the company thought it was a joke.'' Matzan denied posting the LM-3 on the bulletin boards.

On February 28, 1995, Matzan circulated a petition, which 114 unit employees signed. The petition called for a special meeting to consider proposed bylaw changes and to review an audit of the Union's financial records by Johnson. Within a few days, Fischette, with reference to the petition, told Matzan that it was against company rules to conduct union business on company time. However, Matzan assured Fischette that his activities had been conducted during lunch and break periods. In the course of soliciting signatures on the petition, Matzan informed the employees that he intended to run for election for the office of union president.

[1] Johnson is a full-time representative of the International Union.

The Lisa Dennis Incident

Lisa Dennis, employed as a packer operator by the Respondent, took maternity leave from November 1994 to about mid-March 1995. Shortly after her return to work she had a conversation with Matzan in which, according to Matzan, Dennis told him that she was not getting her bonus usually distributed to employees at that time of the year. Matzan asked why that was so and Dennis replied that it was because she had been on maternity leave and that she intended to speak to Graffius about it. Matzan then told her, ''[D]on't go to Larry. He was speaking of having you fired. He said he should have fired you when he had the chance.''[2] While Matzan testified that Dennis did not appear to be upset at the time, Dennis testified that ''If I stated anything, it was just out of shock and I was just totally surprised by the comment that was made.''

Matzan's warning to Dennis stemmed from an alleged incident which had occurred about 2 months earlier, while Dennis was still on leave. Matzan testified that while waiting to pick up his pay check in the human resources office one Thursday, and standing ''shoulder to shoulder'' with Graffius, he heard Graffius tell Jane DeGroote, the Respondent's human resources coordinator, that

> his exact words were, ''We should have fired the bitch when we had the chance.'' And he mentioned Lisa Dennis by name.

Matzan recalled that another individual was standing in line behind him but could not remember his name. Additionally, Matzan stated that Graffius' remark did not elicit any response from DeGroote or others present, nor did Matzan report the incident to Michael Meador, the Respondent's human resources manager, or to Johnson at the International Union since he believed that no action would be taken against Graffius.

The March 31, 1995 Meeting

On March 31, 1995, a meeting was held regarding grievance matters unrelated to Matzan. Present were Meador, Union President Blackmon, Union Vice President Graffius, Union Steward Christopher Smart, and Joe Bailey. At the end of the meeting Blackmon told Meador that Matzan had been spreading a false rumor, that Blackmon, Graffius, and Meador were planning to have employee Lisa Dennis fired because she had taken maternity leave. Meador decided to investigate the matter immediately by bringing in those involved.

Meador first called in Dennis and asked her whether Matzan had spoken to her about the Union and the Company conspiring to fire her. Dennis related that she then told those present what her conversation with Matzan had been, relating:

> [S]tarted out as being a general conversation, I believe, and he was asking how I was doing and somehow in one way or another . . . he informed me that he was in the office while . . . I was off on maternity leave, he was in the personnel office, overheard Larry Graffius speaking to Jane, I'm not sure of her last name, and it was stated at that time in the office that because I was out so long, that I ought to just be fired anyway. . . . Larry Graffius was saying that to Jane.[3]

When asked if she could recall exactly how this arose in their conversation ''the context of it, that Mr. Matzan brought that conversation up to you,'' she responded, ''I'm not quite—I don't know—I don't remember.'' Before excusing Dennis from the meeting, Meador assured her that the Respondent had no intention of firing her and if it had wanted to do so it could have previously accomplished this when she had had an absenteeism problem. Dennis admitted that when Matzan had first told her about the conversation she was initially really upset. After that brief conversation Dennis returned to work.

Dennis also testified that prior to the March 31, 1995 meeting and about 1 or 2 days after her conversation with Matzan, Blackmon approached her and asked her if his name had been mentioned by Matzan; Dennis responded that only Graffius' name had been raised and not Blackmon's. Blackmon assured Dennis at the time that the Union was not trying to get her fired.[4]

Meador next called in Matzan and told him that Meador had been advised that Matzan was spreading false and malicious rumors and lies about Meador, Blackmon, and Graffius, and telling employee Lisa Dennis that he had overheard a conversation between Graffius in which they were conspiring to discharge her because she had taken maternity leave. Matzan denied saying ''any such thing'' but stated that he had told Dennis about the conversation he had overheard and that the conversation occurred between Graffius and DeGroote with no mention of Meador's and Blackmon's names.

DeGroote was also called into this meeting. She denied having had a conversation with Graffius about Dennis or had contrived or schemed to have Dennis fired because she had taken maternity leave. When DeGroote testified as a witness at this hearing she again denied even having talked to Graffius about Dennis and on being asked if she had heard Graffius say, ''[W]e should have fired the bitch when we had the chance,'' DeGroote answered, ''No.'' DeGroote testified that she was ''shocked'' and ''hurt'' that she had been accused of this. However, Matzan testified that he recalled DeGroote's answer, verbatim, and that she had said that she did not recall the conversation. Meador stated that when DeGroote was accused of conversing with Graffius and talking about having Lisa Dennis fired for being pregnant, she just said, ''I mean she just, it was just a kind of look of panic in her face, and she was actually quite hurt and taken

[2] It would appear that while the transcript reads ''he'' Matzan probably said ''we'' meaning the Respondent, since Graffius as a union official had no authority to fire Dennis.

[3] Both Matzan and Dennis testified that Matzan had told her the conversation was between Graffius and DeGroote. Meador, Smart, and Bailey believed that Dennis had related that Matzan placed the conversation as between Graffius and Meador. While Blackmon and Graffius were present at the March 31, 1995 meeting throughout, neither testified at the hearing.

[4] It is interesting to note that although Dennis assured him he was not implicated, Blackmon mentioned himself on March 31, 1995, as one of those whom Matzan was reported to have spread falsehoods about conspiring to discharge Dennis.

aback, and you know, said something to the effect of, of course I didn't do it.''

However, on cross-examination, Meador admitted that DeGroote had not been asked directly if Graffius had made such a statement about Dennis but that in a later conversation with her, DeGroote unequivocally denied that Graffius had done so. Meador stated that at another meeting DeGroote further told him, ''that she just didn't remember anything at all.'' Nonetheless, according to Meador, DeGroote continued to maintain that she herself had never suggested that Lisa Dennis be fired.[5]

Bailey, a forklift checker and unit employee, has been employed by the Respondent for over 6 years. At the time of the hearing he was treasurer of the Union. Bailey testified that at the March 31, 1995 meeting, he attended as a steward, and Blackmon complained about Matzan spreading rumors about he and Graffius and Graffius said that Matzan had told Lisa Dennis that he and Meador were plotting to fire her. According to Bailey when Dennis was brought into the meeting she said that Matzan had told her that Graffius and somebody else, maybe Meador, had been discussing that she should be fired because of her maternity leave. Bailey related that Matzan had told them that he overheard Graffius telling DeGroote that Dennis should be fired for having taken maternity leave, and that when DeGroote was called into that meeting her exact words were, ''I do not recall the conversation.''

Smart, the other steward in attendance at the meeting and currently the Union's vice president and a group leader in the Respondent's sauce department, testified that it was mostly Graffius talking and he and Blackmon said that Matzan was spreading vicious rumors by telling Dennis that they said Meador wanted her fired. When Dennis was called into the meeting she explained that Matzan said that ''Graffius and she thinks [sic] Mike [Meador], but at that time she wasn't sure . . . who was the other party, were talking about relieving her of her duties.'' Smart could not recall to whom he attributed the remark about ''getting rid of Lisa,'' to Graffius or DeGroote, or both. According to Smart, DeGroote denied having such a conversation with Graffius.

Matzan testified that at the conclusion of this meeting, Meador told Matzan that he was ''convinced'' that Matzan was a ''liar'' but no disciplinary action was taken against Matzan at the time. Contrary to Matzan's testimony as to this, Meador related that he did not say then whether he believed Matzan or not. According to Meador after DeGroote left the meeting he told the four union representatives and Matzan that he needed to review the matter and would get back to them. Bailey also testified that Meador also said that he had ''some severe reservations ''about Matzan's honesty.

[5] Meador testified that he believed DeGroote over Matzan because DeGroote had been a valued employee with the Respondent for 8 years, was knowledgeable regarding employment and antidiscrimination laws, and not long before the Dennis incident had been involved in the defense of a prior discrimination charge filed by an employee against the Respondent who alleged unfavorable treatment because of her pregnancy and therefore DeGroote would be extra sensitive to the issue. In light of this it is quite understandable that DeGroote's reaction to the alleged accusation that she had contrived with Graffius to have Dennis fired because of her pregnancy could be one of hurt and panic.

Bailey also testified that during the March 31, 1995 meeting, prior to the Lisa Dennis discussions Meador had mentioned the activity of Chris Smart and Bailey himself in trying to change the Union's leadership, expressing the view that Bailey and Smart were going about this in the wrong way thereby undermining the union leadership, and would ultimately cost them the support of the rank-and-file membership. Bailey stated that Matzan was involved in the challenge to the union incumbents, that he supported Matzan in his endeavors, and that Graffius was one of the incumbents being challenged.

Smart testified that subsequently, at Matzan's grievance hearing over the suspension he previously received because of the Dennis incident, Meador spoke to Smart while they were alone and told him that he was disappointed in Smart because Smart ''was kind of walking both sides of the fence with Mr. Matzan and the Union, the present Union that was there.'' Meador told Smart that elected union officers were entitled to support, and that there was a need for labor-management matters to be dealt with in an orderly way. Smart agreed with counsel for the Respondent that it was a fair inference that Meador was looking for ''a little order in his own life and in his relationship with the Union.''

Meador testified that he had ''very strong suspicioions'' that the alleged conversation between Graffius and DeGroote did not occur, discrediting Matzan and believing Graffius and DeGroote, especially DeGroote. Meador denied that he and Graffius ever discussed terminating Dennis and that the idea that the Respondent would fire Dennis because of her pregnancy was ''preposterous,'' ''crazy'' and ''absolutely bizarre.''

The steps in the Respondent's progressive discipline policy is a first warning, a second warning, suspension, and discharge. Where flagrant or serious conduct is involved, the warnings may be dispensed with, and an employee may be suspended or discharged. Meador explained the reasons for dispensing with any warnings and proceeding directly to a suspension in Matzan's case:

> The potential damage to, quite frankly, Jane DeGroote, myself, the HR Department, the possibility of opening up litigation from an employee who might have believed, I mean there were all these possibilities that—*because he was accusing us of doing, you know, in our work, in my line of work, that is the most serious offense you can be accused of is discriminating against a pregnant woman*. I mean it doesn't get any worse than that.

On April 8, 1995, at a membership meeting of the Union, with approximately 40–50 members a committee charged with rewriting the Local's bylaws was elected, with Matzan as chairperson. A motion from the floor for a vote of no confidence and removal of the Union's current officers was ruled out of order by International Representative Myron Johnson after Matzan argued that such a motion was proper.

On April 10, 1995, Matzan was called to meet with Meador regarding the Dennis matter before any discipline was imposed. Matzan normally worked until ''around four'' and was paged about 3 p.m. to attend this meeting. Matzan's immediate superior, Jim Fischette, Meador, union recording secretary Carl Davenport, and Fischette's supervisor, Terry

Redden, were in the office when Matzan arrived. Matzan objected to the presence of Davenport as not being a steward and requested Bailey to represent him. Before Bailey could arrive, and while Matzan and Davenport were waiting outside Meador's office Matzan announced through the door that he was leaving. Meador testified that he told Matzan that they were there to investigate the Lisa Dennis incident and if Matzan left, a disciplinary decision would be made without his input. Nevertheless, Matzan said ''he didn't care,'' and left testifying that he did so because he had a previously scheduled appointment with his tax accountant and Meador could ''tell it all to Joe Bailey.'' Meador stated that before Matzan left he advised Matzan that since Matzan was being uncooperative, he was being suspended for the next 3 days. Matzan then left the plant before his electrician replacement arrived.

On April 10, 1995, Matzan never informed anyone (prior to yelling though the door of Meador's office) that he had an appointment and had to leave before his replacement arrived. Earlier in March 1995, Matzan had agreed to alter his work schedule to 4 p.m. or such earlier time as the next shift electrician, Tom Zynda, came to work to relieve him. On a prior occasion when Matzan had to leave earlier then 4 p.m. he had arranged with a fellow electrician Tony Peluso to cover for him. However, on April 10, Matzan left before Zynda arrived leaving the plant without any electrician coverage.

On April 21, 1995, Matzan was given a second 3-day suspension without pay for walking out of the April 10, 1995 disciplinary meeting and leaving the Respondent's operations with no electrical coverage at the peak of its daily production. The memo advising Matzan of his suspension states that: ''Further reasons for disciplinary action upon your return may lead to discharge of your employment.'' This suspension is not alleged as a violation in the consolidated complaint, was given for an unauthorized absence from the plant, was on Matzan's record at the time of his discharge, and the Respondent alleges to have relied on it in part, in discharging Matzan.

Matzan's Suspension and Discharge

Bill Gowan, a unit employee, had been discharged and his discharge arbitration was scheduled for September 11, 1995, at the Respondent's facility. Initially, Bailey had handled Gowan's discharge grievance, but after resigning as steward in May 1995 he gave the file to Matzan, to investigate despite the fact that Matzan was not a steward. Matzan conducted an unofficial investigation of Gowan's grievance, and turned his findings over to Jules Smith, an attorney for the Union handling Gowan's arbitration. Gowan had asked Matzan to attend his hearing although Matzan was neither a union official, a steward, nor a witness for either party, and Matzan stated that he gave his word that he would do so or would try to. Matzan was also informed by Smith that his presence at the Gowan hearing would probably be challenged by the Respondent's counsel.

On September 6 or 7, 1995, Matzan was working a 4 a.m. to 12:30 p.m. shift and asked his supervisor, Jim Fischette, if he could start (and therefore finish) 2 hours early on Monday the September 11. When Fischette asked Matzan the reason for this request, Matzan responded that it was personal. Matzan testified that Fischette agreed at that time to his request. According to Fischette, he told Matzan that it probably would not be a problem, and that he would see what he could do. Fischette also testified that at a production meeting on September 7, 1995, he was reminded that Monday, September 11, 1995, was the beginning of the ''fall pack'' season, the beginning of the apple harvest, with the first day of the fall pack being the busiest day of the year for all employees, including electricians. Cooking and packaging machinery that has remained dorment during the slack season is reactivated, requiring numerous adjustments and repairs.

On Friday, September 8, 1995, Fischette advised Matzan that he could not work the earlier shift on Monday because September 11, 1995, was the beginning of the fall pack season, the busiest day of the year for the Respondent's operations. Matzan insisted that he needed the time off for personal business, and Fischette asked him if he could reschedule it, and if not, tell Fischette how much time he would need to accomplish it. Matzan replied that he did not know and would get back to Fischette.

On Saturday, September 9, 1995, in discussing Matzan's request to change his schedule on September 11, 1995, Fischette advised Matzan he could not allow him to do so because the plant would be busy that day. Matzan told Fischette that he needed to take off a couple of hours at most ''possibly take care of the business I had to attend on my lunch hour.'' Again Matzan would only tell Fischette that the request was for personal business. Matzan testified that Fischette told him that, if he ''got it done in time, to come back and punch in and continue to work.'' However, Fischette testified that he told Matzan that he did not know if Matzan could have the time off, and they would have to see on Monday, September 11, 1995. Fischette related that later that day, after Matzan had finished his shift and gone home, Tony Peluso, another electrician, told Fischette that Matzan's request was based on his desire to attend the Gowan arbitration.

On Monday, September 11, 1995, at about 8:30 a.m., after Fischette asked Matzan what he found out about his need for time off, and Matzan would only answer that it was for personal business, Fischette asked Matzan if he was going to attend the Gowan arbitration. Matzan testified that he told Fischette

> that I felt that if I was on my lunch hour I could go wherever I pleased on my lunch hour, that was my time if I was off the clock.[6]

While Matzan could not recall Fischette's response with certainty, according to his recollection, Fischette forbid him to conduct any union activity or to attend the Gowan arbitration.

Fischette testified that after he asked Matzan if he was going to attend the arbitration, Matzan ''got upset'' and said, ''[A]re you interfering with a Union activity?'' Fischette told him ''no'' and asked Matzan what role he had in the Gowan arbitration. Matzan acknowledged that he was not a union official or steward, was not a witness at the arbitration, and only wanted to attend because he had promised Gowan that he would if he could. Fischette told Matzan he did not have

[6] The record reveals that the Respondent's employees are permitted to leave the facility on their lunch period, provided they punch in and out.

permission to go to the arbitration and that he was expected to be on the floor working. Fischette related that Matzan said he was ''leaving anyway'' and Fischette replied, ''Gene, remember what happened to you last spring,'' referring to Matzan's April 21, 1995 3-day suspension for leaving the plant during his shift without permission, Matzan then said, ''You do what you gotta do and I'll do what I gotta do.'' Matzan and Fischette then parted.[7]

Matzan's testimony as to what occurred thereafter differs somewhat from that given by the Respondent's witnesses. Matzan testified that he decided to seek out Fischette to make it clear that he intended to use an early lunch hour to attend Gowan's arbitration hearing on his own time. Matzan had arranged with Peluso, another electrician, to cover for him during his absence since he was taking his lunch hour at a different time. Fischette's approval was not necessary for electricians to change lunch hours as long as they arranged with another electrician to cover the plant for them. Meanwhile, Fischette had reported to Meador what had occurred with Matzan and it was decided to suspend Matzan if he walked off the job.

Matzan testified that he tried unsuccessfully to page Fischette several times on his two-way radio, carried by electricians looking for his supervisor. Fischette testified that at about 9:25 a.m., needing Matzan to fix a malfunctioning conveyor on the single-serve applesauce line A, he paged Matzan using both the central paging system and the two-way radio.[8] Fischette also heard a juice production line manager paging Matzan. When Matzan failed to respond, Fischette contacted Pinkerton security guard Laurie Doyle, at the guard station near the timeclock.[9] The time was about 9:55 a.m. and Fischette asked Doyle if she had seen Matzan. According to Fischette, Doyle told him that she had seen Matzan going into the men's locker room, whereupon Fischette asked Doyle to tell Matzan that he was needed on single-serve line A.

It is undisputed that Doyle delivered Fischette's message to Matzan as he was passing the guard station on his way to the conference room and the hearing but Matzan was unsure as to whether Doyle made reference to the single-serve line A when he was leaving, or when he returned. Matzan testified that he told Doyle that he was going to lunch, that Fischette was aware of it, and that he would see him when he got back.[10] Doyle then reported to Fischette that Matzan, wearing a business suit, had punched out. Fischette contacted Meador and related what had happened regarding Matzan, and Meador instructed Fischette to suspend Matzan on his return.

Matzan proceeded directly to the conference room where the arbitration was being held, knowing that in all probability he would be asked to leave. Matzan explained that he did so anyway because he had given Gowan his word that he would be there. At the arbitration hearing, Matzan was asked to leave by the Respondent's attorney. While Meador was also present he did not order Matzan back to work immediately.

Doyle contacted Fischette at about 10:10 a.m. to notify him that Matzan had returned, attempted to punch in, and then gone back into the men's locker room. Fischette went down to the security guard station near the locker room entrance and when Matzan emerged in his work clothes, Fischette suspended him, escorted him to lock up his tools, and then walked him out of the plant. Although Matzan asked Fischette for a reason for the suspension, Fischette did not give him any nor did he tell Matzan the length of the suspension.

After Matzan was suspended on September 11, 1995, Fischette drafted a memo to Meador relating the circumstances leading to Matzan's suspension. Fischette met with Meador and recommended that Matzan be terminated for gross insubordination, i.e., deliberately leaving the plant floor after Fischette told him he could not leave and that he would be subject to discipline if he did. By letter dated September 15, 1995, Matzan was informed that he had been terminated.

Credibility

Based on a careful analysis of the testimony of the witnesses and the evidence presented, my observation of the demeanor of the witnesses, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences which may be drawn from the record as a whole,[11] I tend to credit the account of what occurred regarding the Dennis incident as given by the General Counsel's witnesses, although I did note some inconsistencies in their testimony. Their testimony was given in a forthright and believable manner and in most respects was consistent with each others. While this is not to say that I disbelieved all of the testimony of the Respondent's witnesses, I did note inconsistencies of an important nature between that of Meador and DeGroote as set forth here. Moreover of some significance is the failure of the Respondent to call Graffius as its witness. From the record evidence, it must be presumed that his testimony would not support the contentions of the Respondent.[12] Moreover, the Respondent

[7] While Marty Cressman, a maintenance supervisor, was present during this conversation, he was not called as a witness to testify.

[8] While Matzan testified that Fischette had told the electricians to disregard a page if they were at lunch, Fischette denied that he had told the electricians this.

[9] Doyle, who had been employed by the contract security agency for 12 years, became an employee of the Respondent about 2 weeks before the hearing.

[10] Doyle testified that Matzan made no mention to her of his going to lunch.

[11] *Gold Standard Enterprises*, 234 NLRB 618 (1978); *V & W Castings*, 231 NLRB 912 (1977); and *Northridge Knitting Mills*, 283 NLRB 230 (1976).

[12] The Respondent in its brief asserts, ''Because the General Counsel failed to call Graffius as a witness, it must be presumed that he too would have denied that such a conversation ever took place,'' (between he and DeGroote). *Gatliff Coal Co*., 301 NLRB 793 fn. 2 (1991), enfd. 953 F.2d 247 (6th Cir. 1992). (Failure to call a witness presumably friendly to the party's cause warrants an inference that the testimony would not have supported that party's case); and *International Automated Machines*, 285 NLRB 1122 (1987). However, the record clearly shows that Graffius cannot be presumed in anyway to be friendly to Matzan's case, therefore the General Counsel's case. In that regard it is reasonable for the trier of the facts to draw an inference that Graffius' testimony would be unfavorable to the Respondent. *7-Eleven Food Store*, 257 NLRB 108 (1981); *Publishers Printing Co*., 233 NLRB 1070 (1977); *Martin Luther King Sr. Nursing Center*, 231 NLRB 15 (1977); and *Broadmoor Lumber Co*., 227 NLRB 1123 (1977).

failed to call its supervisor, Cressman, as its witness to support the testimony of Fischette as to his conversation with Matzan mentioning his lunch hour on September 11, 1995.[13] Additionally, based on the demeanor of the witnesses and other facts in the record, I found the General Counsel's witnesses more credible.

Analysis and Conclusions

1. The consolidated complaint alleges that Matzan was suspended on April 10, 1995, because he had engaged in protected activity. The Supreme Court in *NLRB v. Burnup & Sims, Inc*., 379 U.S. 21, 57 (1964), held that:

> In sum, Section 8(a)(1) is violated if it is shown that the discharged employee was at the time engaged in a protected activity, that the employer knew it was such, that the basis of the discharge was an alleged act of misconduct in the course of that activity, and that the employee was not, in fact, guilty of that misconduct.

This is true even though the employer acts in good faith. Id. at 23–24. The Board, in applying the standard set forth in *Burnup & Sims*, also inquires whether the employer would have taken the same action in the absence of the protected activity. *KNTV, Inc*., 319 NLRB 447 (1995), citing *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983). In *City Disposal Systems*, 465 U.S. 822 (1984), the Supreme Court expressed its approval of the Board doctrine that acts or statements by individual employees constituted ''concerted activity'' within the meaning of the Act when an objective of the act or statement was to induce or initiate actions beneficial to other employees, as well as he or she.

In *Meyers Industries*, 281 NLRB 882, 887 (1986) (*Meyers II*), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1981 (D.C. Cir. 1987), the Board enunciated the principles it would apply to statements by an individual employee alleged to constitute ''concerted activities'' protected by Section 8(a)(1) of the Act, by quoting with approval the following language in *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683 (3d Cir. 1964):

> It is not questioned that a conversation may constitute a concerted activity although it involves only a speaker and a listener, but to qualify as such, it must appear at the very least it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees.

The Respondent in its brief states that Matzan's speech was not concerted activity because there was no proof that group action of any kind was intended, contemplated, or even referred to, citing *Meyers Industries* (*Meyers II*), supra, and *Daly Park Nursing Home*, 287 NLRB 710 (1987). In *Daly Park Nursing* the Board noted:

> Activity which consists of mere talk must, in order to be protected, be talk looking toward action. If its only purpose is to advise an individual as to what he could or should do without involving fellow workers or union representatives to protect or improve his status or working position, it is an individual, not a concerted activity, and, if it looks forward to no action at all, it is more likely then to be mere griping, id. at 710 (quoting *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964).

However, applicable to the facts at issue in this case is the line of cases establishing the rule that employee discipline or discharge for discussing with other employees subjects affecting employment interferes with, restrains, and coerces each discussant in the exercise of his or her right to engage in concerted activity for material aid or benefit. *Express Messenger Systems*, 301 NLRB 651 (1991); *U.S. Furniture industries*, 243 NLRB 159 (1979); *El Gran Combo*, 284 NLRB 1115 (1987), affd. 853 F.2d 996 (1st Cir 1988); *Jhirmack Enterprises*, 283 NLRB 609 (1987); *Scientific Atlanta*, 273 NLRB 622 (1986); *O'Hare Hilton*, 248 NLRB 255 (1980); *Pioneer Natural Gas Co*., 253 NLRB 17 (1980); and *General Motors Corp*., 239 NLRB 34 (1978).

For example, in *Jhirmack Enterprises*, supra, the discharged employee, Allison, had warned a coworker, Ramsey, that other employees had complained of his performance at an ''attitude meeting.'' The Board affirmed the administrative law judge's finding at 283 NLRB 615 that the employee's purpose was:

> to confirm to Ramsey that adverse comments had been made to management about his work, and to encourage him to take corrective action. Viewed from this perspective, it is clear that Allison's discussion with Ramsey was a fundamental form of concerted activity in aid of a fellow employee.

And, in *Express Messenger Systems*, supra, employee Haas told another employee, Finnigan, to delay taking her leave of absence in order to secure better benefits as suggested by management. Haas said that the employer was not considering her best interests in recommending the leave. Both the Board and the administrative law judge found Haas' advice to Finnigan to be protected concerted activity.

In the instant case, Matzan sought to put fellow employee Dennis on notice of a matter affecting her employment—that Graffius was not the best person to represent her about her bonus issue with management in view of what he had allegedly said about her in the presence of management. I therefore find that Matzan's activity was clearly protected and concerted as well.

Moreover, the record reveals that the Respondent knew of Matzan's protected concerted activity on March 31, 1995, when it was brought to Meador's attention by union officials Blackmon and Graffius and then Matzan and Dennis. It is also clear from the evidence that the basis for Matzan's suspension by the Respondent was an alleged act of misconduct in the course of his protected, concerted activity.

The Respondent in its brief asserts in support of its suspension of Matzan that there is no credible evidence in the record that Graffius and DeGroote ever discussed terminating Dennis and that Matzan's statement to Lisa Dennis was not protected because it was defamatory in nature and made with knowledge of its falsity. The Respondent alleges that the defamatory content of Matzan's statement to Dennis is ''plain on it [sic] face.'' Matzan was accusing the human resources department and a union representative of conspiring to com-

[13] *7-Eleven Food Store*, supra, and cases cited therein.

mit an act of unlawful discrimination. The Respondent considered this to be a most serious offense. The Respondent continues, given the gravity of the accusation, Matzan had a duty to verify its accuracy before repeating it. Because he did not, he's false statement was not protected under the Act, *Delta Health Center*, 310 NLRB 26 (1993); *Martin Marietta Corp*., 293 NLRB 179 (1989); and *Sahara Datsun*, 278 NLRB 1044 (1986), enfd. 811 F.2d 1317 (9th Cir. 1987).

However, I do not agree. First, the evidence indicates that the alleged misconduct for which Matzan was suspended—accusing Meador of conspiring with Graffius to discharge Dennis—simply did not occur. What the evidence in the record does show is that Matzan told Dennis that DeGroote was present when he overheard Graffius make the statement that she should be fired because she had taken maternity leave. Matzan never claimed that DeGroote had said or did anything inappropriate or implicated Meador or DeGroote in a conspiracy with the Union to do so. As the General Counsel points out, that the conduct Matzan did engage in—reporting an indiscretion on the part of a union representative to an employee who was the subject of that indiscretion—if true could not have been lawfully punished by the Respondent. Moreover, Graffius was never called as a witness to deny that such a conversation or remark was ever made by him.

The Respondent asserts that DeGroote, ''who was a forthright and credible'' witness testified that she never had such a conversation with Graffius. Her denial is not so clear when her testimony is considered as a whole at the hearing.[14] Moreover, DeGroote's denial came at a meeting with her superiors and employer and from her reaction to the accusation could have reasonably been based on various reasons: the presence of Meador, her supervisor, the union officials involved, etc. Additionally, her experience in another antidiscrimination charge against the Respondent just prior to the Dennis matter in which she was involved would make her even more sensitive to any accusation. That DeGroote's reluctance to shoulder a serious accusation in which she would only have been in effect a bystander is understandable. Additionally, as indicated above, Graffius was never called as a witness and while the Respondent alleges DeGroote might not be involved in an alleged conspiracy to violate the law or make any statements to that effect, it is not without the realm of possibility that Graffius would.

Moreover, notwithstanding, that Matzan had no previous offense on his record the Respondent skipped two steps in its progressive discipline process to suspend Matzan. While it is true that the Respondent's policy reserved to it the right to proceed to harsher discipline where circumstances warrant, the Respondent alleges it did so in Matzan's case because his statement to Dennis, in which he accused the Employer of conspiring to terminate her because she took maternity leave ''constituted defamation per se.'' The Respondent asserts that Matzan accused the human resources department of the ''most serious offense possible—discrimination against an employee based on a protected characteristic.'' However, the evidence clearly shows that Matzan had only accused union official Graffius of such conduct and not DeGroote, Meador, or the Respondent.

Additionally, it should be noted that, it was union officials Blackmon and Graffius who urged that the Respondent ''stop'' Matzan. They had complained to Meador on March 31, 1995, that Matzan was spreading false and defamatory rumors about them and Meador despite the fact that Dennis had specifically informed Blackmon directly that Matzan had not mentioned his name, only Graffius'. The union officials also added Meador's name to the story about Matzan although Dennis had not.

Also, the Respondent's preference for the incumbent union officials at the time is evidenced by the testimony of Bailey and Smart. While Meador may not have been aware that Matzan was seeking the Union's presidency until after his suspension, the evidence shows that Matzan had been a thorn in the incumbent's side for more than 2 months, and also that the Respondent was aware of his intraunion activities.

Thus, the timing of the Respondent's action, April 10, 1995, in this connection is also significant. After the March 31, 1995 meeting, the Respondent did nothing in regard to the Dennis incident for more than a week not continuing its investigation thereof. However, on the Monday after a Saturday union meeting where Matzan was elected chairperson to head a committee to rewrite the bylaws and argued in favor of removing the current union officers, the Respondent scheduled the disciplinary meeting. While the General Counsel in his brief suggests the possibility that Blackmon and Graffius were in Meador's office that morning demanding action against Matzan, there is no evidence in the record to support this.

When an employer does not follow its own progressive discipline policy, it is some evidence (though not conclusive evidence) that the proffered reason for the employer's action is not the real reason. *McLean Roofing Co*., 276 NLRB 830 (1985); and *Fast Food Merchandisers*, 291 NLRB 897 (1988). The timing of events, the severity of the discipline in the absence of any prior offense, the elaboration of the Union's complaint to Meador and his reaction thereto, and his evidenced preference for the incumbent union officers, all indicate that the proferred reasons for the suspension of Matzan were false, from which it may be inferred that the true reason was Matzan's protected, concerted activity. *Shattuck Denn Mining Corp*., 151 NLRB 1329 (1965), enfd. 362 F.2d 466 (9th Cir. 1960); *Cell Agricultural Mfg. Co*., 311 NLRB 1228 fn. 3 (1993); and *KNTV, Inc*., supra.

From all of the above, I find and conclude that when the Respondent suspended Matzan on April 10, 1995, because of his protected, concerted activity it violated Section 8(a)(1) of the Act.

2. The consolidated complaint also alleges that the Respondent violated Section 8(a)(1) and (3) of the Act when it suspended Matzan on September 11, 1995, and then discharged him on September 15, 1995.

In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 299 (1st Cir. 1988), cert. denied 455 U.S. 989 (1982), the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, the General Counsel must persuade that antiunion sentiment was a substantial or motivating factor in the challenged employer decision. Once, the General Counsel has met that burden, the

[14] See Bailey's testimony regarding the March 31, 1995 meeting and Meador's testimony as to his conversation with DeGroote, thereafter.

burden of persuasion then shifts to the employer to prove that the alleged discriminatory conduct would have taken place even in the absence of the protected activity. *Manno Electric*, 321 NLRB 228 (1996); and *Wright Line*, supra.

The Respondent asserts in its brief that ''Matzan's act of attending the Gowan arbitration was not protected activity.'' I do not agree. The record clearly shows that the Respondent was aware of Matzan's union activism generally and protected, concerted activities. Moreover, Gowan had specifically requested Matzan's attendance at the hearing since according to Matzan, he did not trust the union representative, Matzan had been involved in the ''unofficial'' investigation of Gowan's grievance, and presumably Gowan felt that Matzan's attendance would be helpful and supportive of him at the hearing, therefore Matzan's attendance at the hearing would constitute protected, concerted activity. This would be true despite the fact that at the time of the Gowan arbitration, Matzan was not a witness, not a union steward or officer, and had given all the information concerning his investigation to the Union's attorney representing Gowan.

However, as the Respondent asserts, ''even assuming arguendo that Matzan had a protected reason for attending the Gowan arbitration, that activity lost its protection when Matzan abandoned his duties after being specifically told by Fischette that he could not attend the arbitration.'' Thus, it is not only clear that the Respondent was aware of Matzan's protected and union activities, but that he was disciplined for disobeying Fischette's order not to engage in that protected activity, i.e., attend the Gown arbitration. Thus, the General Counsel has sustained its burden of persuasion under *Wright Line* and the burden then shifts to the Respondent to prove that the discriminatory conduct would have taken place even in the absence of the protected activity.

Under the circumstances in this case I am not persuaded that the alleged discriminatory conduct would have taken place even in the absence of the protected activity. On Saturday, September 1995, Matzan told Fischette that he might be able to accomplish what he wanted to do on his lunchbreak on Monday. Fischette told him to try to arrange it so that he would be available on Monday by rearranging his personal need. When confronted by Fischette on Monday and told not to attend Gowan's hearing that day, Matzan told Fischette that he could go where he pleased on his lunch hour. Matzan testified without contradiction that he had made arrangements with another electrician, Tony Peluso, to cover for him while he took an early lunch hour, which electricians are expected to do if they alter their lunchbreaks, and for which Matzan did not need Fischette's permission.

Moreover, the Respondent's reasons for discharging Matzan seems almost pretextual. At first alleging that Monday was the ''busiest'' day of the year and he was needed on the floor, it appears from the record evidence that the Respondent's main reason for denying him permission to attend Gowan's hearing was his protected activity, its desire to preclude his attendance therein since Fischette appears to have considered the possibility of altering Matzan's hours for other reasons without reference to this, especially. Also, it was the Respondent who challenged Matzan's appearance at Gowan's hearing, who suspended Matzan immediately on his return to the plant floor on the ''busiest'' day of the year when it allegedly needed its full complement of electricians, and there is no evidence in the record that between 9 and 10 a.m. that there were any major electrical problems present.

This is not to say that an employer has no right to discipline employees for insubordination or violation of plant rules. But an employer cannot discriminate in regard to hire or tenure or conditions of employment of its employees because of their protected, concerted activities. From all of the above, I find and conclude that the Respondent violated Section 8(a)(1) and (3) of the Act when it unlawfully suspended and discharged Eugene A. Matzan because he engaged in protected, concerted activities and activities on behalf of the Union and to discourage employees from engaging in these activities and membership in a labor organization.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of the Respondent set forth in section III, above, found to constitute unfair labor practices occurring in connection with the operations of the Respondent described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent unlawfully suspended Eugene A. Matzan on April 10, 1995, because he engaged in concerted activities with another employee for the purpose of mutual aid and protection by warning the other employee about matters affecting the terms and conditions of her employment and to discourage employees from engaging in this or other concerted activity, and unlawfully suspending Matzan on September 11, 1995, and discharging him on September 15, 1995, because he engaged in activities on behalf of the Union and engaged in concerted activities, and to discourage employees from engaging in those activities, the Respondent shall be ordered to rescind the above suspensions and also to offer Matzan immediate reinstatement to his former position, discharging, if necessary, any replacement hired since his termination, and that he be made whole for any loss of earnings or other benefits by reason of the above discrimination against him in accordance with the Board's decision in *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest computed as in *New Horizons for the Retarded*, 283 NLRB 1187 (1987). See also *Florida Steel Corp*., 231 NLRB 651 (1977), and *Isis Plumbing Co*., 138 NLRB 716 (1962).

Because of the nature of the unfair labor practices found, and in order to make effective the interdependent guarantees of Section 7 of the Act, I recommend that the Respondent be ordered to refrain from in any like or related manner abridging any of the rights guaranteed employees by Section 7 of the Act. The Respondent should also be required to post the customary notice.

CONCLUSIONS OF LAW

1. The Respondent, Cadbury Beverages, Inc., is now and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, Retail, Wholesale and Department Store Union, Local 220, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent, in violation of Section 8(a)(1) of the Act, has interfered with, restrained, and coerced its employees in the exercise of their rights under Section 7 of the Act by suspending Eugene Matzan on April 10, 1995, because he engaged in concerted activities with another employee for the purposes of mutual aid and protection by warning the other employee about matters affecting the terms and conditions of her employment, and to discourage employees from engaging in this or other concerted activity.

4. The Respondent engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act discriminating in regard to tenure or hire or conditions of employment by suspending Eugene Matzan on September 11, 1995, and then discharging him on September 15, 1995, because he engaged in activities on behalf of the Union and engaged in concerted activities and to discourage employees from engaging in such activities and membership in a labor organization.

5. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[15]

ORDER

The Respondent, Cadbury Beverages, Inc., Rochester, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Suspending its employees because they engage in concerted activities and to discourage employees from engaging in such activities.

(b) Discriminating in regard to the hire or tenure or conditions of employment of its employees suspending and discharging its employees because they engage in activities on behalf of the Union and in concerted activities and to discourage employees engaging in these activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer employee Eugene A. Matzan immediate and full reinstatement to his former job or, if his position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed by him, and make him whole for any loss of earnings and other benefits suffered by him as a result of the discrimination against him in the manner set forth in the remedy section of this decision.

(b) Rescind the suspensions unlawfully issued to Matzan on April 10 and September 11, 1995, and make him whole for any loss of earnings and other benefits suffered by him as a result of the discrimination against him in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any references to the unlawful suspensions and discharge of Matzan, and within 3 days thereafter notify him in writing that this has been done and that the suspensions and the discharge will not be used against him in any way.

(d) Preserve and within 14 days of a request, make available to the Board or it agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Williamson, New York, copies of the attached notice marked ''Appendix.''[16] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business, or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 22, 1995.

(f) Within 14 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

[15] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[16] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT suspend employees because they engage in protected concerted activities with other employees for the purposes of mutual aid and protection by warning them about matters affecting the terms and conditions of employment, and to discourage employees from engaging in this or other concerted activity.

WE WILL NOT suspend and then discharge our employees because they engage in activities on behalf of the Union and engage in protected, concerted activities and to discourage employees from engaging in such activities and membership in a labor organization.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Eugene A. Matzan full reinstatement to his former position or, if his position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Eugene A. Matzan whole for any loss of earnings and other benefits resulting from his suspensions and discharge, less any net interim earnings, plus interest.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful suspensions and discharge of Eugene A. Matzan, and WE WILL within 3 days thereafter, notify him in writing that this has been done and that the suspensions and the discharge will not be used against him in any way.

CADBURY BEVERAGES, INC.